further explained that "[d]ismissal of plaintiffs' case on standing grounds would have been premature at [the pleading] stage because the class was not well-defined and class discovery had not yet taken place." Pet. App. C, p. 19a. The district court concluded, however, that "[a]s litigation progresses, . . . and the facts and basis of the litigation become apparent, reasonable inferences are no longer afforded and plaintiffs' allegations must clearly indicate that standing is proper." *Id.* After completion of class certification discovery, the district court reexamined petitioners' indirect injury allegations against the extensive evidence before it. It determined that the evidence did not sustain their indirect injury theory as a basis for Article III standing.

The district court held that the Missouri-wide, amorphous "neighborhoods" defined by petitioners did not begin to resemble "the 'relatively compact neighborhood' envisioned by *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 114 (1979)[,]" and that petitioners had not demonstrated that each resident of these "neighborhoods" had suffered a "distinct and palpable injury" at the hands of each of the thirteen unrelated insurance company groups. Pet. App. C, p. 9a.

The district court concluded that petitioners lacked standing because: (i) no individual petitioner had alleged to have been directly injured by each of the insurance companies; (ii) petitioners failed to sufficiently allege that the insurance companies had engaged in a civil conspiracy or other joint action; and (iii) they had not put forward sufficient proof of an indirect injury fairly traceable to each company's conduct.

The district court's dismissal was *without prejudice* and expressly left open to "each plaintiff who chooses to do so" the opportunity to "refile against the defendant or defendants with whom each plaintiff has alleged grievances." Pet. App. C, p. 20a. Shortly thereafter, petitioners filed separate class actions against most of the insurance companies. They also appealed the district court's dismissal of their claims to the United States Court of Appeals for the Eighth Circuit. After hearing oral argument, and with an extensive record on appeal before it, the Eighth Circuit adopted the ruling of the district court.[3] The Eighth Circuit then denied petitioners' request for rehearing *en banc* without dissent. Petitioners now seek a writ of certiorari.

REASONS FOR DENYING THE WRIT

In their effort to persuade this Court to invoke its rarely exercised supervisory powers, petitioners have mischaracterized the district court's order, contending that it "conflicts directly" with *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), *Gladstone, Realtors v. Bellwood*, 441 U.S. 91 (1979), and *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). They assert incorrectly that the district court dismissed the case because each plaintiff had not alleged a *direct* injury caused by the conduct of each insurance company.

Actually, however, the district court dismissed the case *on its facts*, concluding that petitioners had not demonstrated either a direct or indirect injury fairly traceable

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[3] The Eighth Circuit's unpublished *per curiam* order adopted the district court's opinion pursuant to Circuit Rule 47B, reserved for instances in which "an opinion would have no precedential value."

to the conduct of each insurance company. The district court's ruling is consistent with -- and indeed expressly based upon -- *Trafficante*, *Gladstone* and *Havens*.

The district court acknowledged that, under these cases, allegations of an indirect, "neighborhood injury" may sometimes be sufficient to confer standing at the pleading stage of an FHA case. It went on, however, to hold that a "class comprised of every predominantly minority zip code in Kansas City and St. Louis, numbering at least 93,000 persons is not the 'relatively compact neighborhood' envisioned by *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 114 (1979) and plaintiffs have not borne their burden of proving that every person living within a predominantly minority zip code has suffered injury in fact." Pet. App. C, p. 9a. The district court thus correctly applied this Court's decisions in determining that petitioners' "indirect injury" standing theory, though sufficiently pled, ultimately failed on the facts. Contrary to petitioners' contentions, there is no "direct conflict" between the district court's order and this Court's rulings. At most, the petition can be read as presenting a lower court's dismissal based upon a "misapplication of a properly stated rule of law" or "erroneous factual findings." That is not what the lower did, but even if it were, this would not warrant Supreme Court review. Sup. Ct. R. 10.

The district court's dismissal of the case does not foreclose petitioners' ability to seek relief under the FHA, or in any way imperil the integrity of that statute. Its dismissal without prejudice provided petitioners the opportunity to refile separate claims against the insurance companies, and they have since filed separate actions against most of the original defendant companies.

I.

THE LOWER COURT'S DISMISSAL DID NOT IMPERIL THE INTEGRITY OF THIS COURT'S "INDIRECT INJURY" STANDING DECISIONS.

A. The Minimum Article III Standing Requirements

To possess standing to pursue any claim, including a claim of "indirect injury," a plaintiff must satisfy the minimum Article III requirements articulated in *Warth v. Seldin*, 422 U.S. 490 (1975), and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). *Lujan* restated the three basic requirements of Article III standing: (i) a concrete, particularized and non-speculative "injury in fact," which is (ii) "fairly traceable" to the challenged conduct of the defendant(s), and (iii) likely to be "redressed by a favorable decision." *Lujan*, 504 U.S. at 560-561.

These requirements apply to class actions as well as individual actions. Unless a class representative can demonstrate that he or she personally has standing under Article III to sue each named defendant, that plaintiff may not seek relief either individually, or on behalf of a class of persons similarly-situated. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

Article III standing requirements do not disappear when a plaintiff alleges indirect injury. On the contrary, an indirect injury claim increases the plaintiff's burden to demonstrate standing. Indirectness of injury, though not fatal to standing, "may make it substantially more difficult to meet the minimum requirement[s] of Art[icle] III," *Warth*, 422 U.S. at 505, and will require "further particularized

allegations of fact deemed supportive of [the] plaintiff's standing." *Id.* at 501. Moreover, while allegations of indirect injury may be sufficient at the pleadings stage, as the case proceeds, the plaintiff's burden to demonstrate standing increases, and simple allegations no longer suffice. *Lujan*, 504 U.S. at 561.

Petitioners had a particularly heavy evidentiary burden as to standing: they not only had to provide "further particularized allegations of fact" as required by *Warth* to support their indirect injury claim; they also had to provide substantive evidence to support their indirect injury allegations because class certification discovery had taken place, and the case had moved beyond the pleadings stage.

B. Nothing in the District Court's Decision Threatens the Integrity of the Decisions of this Court.

The district court's ruling is wholly consistent with this Court's decisions in *Trafficante*, *Gladstone*, and *Havens*. Read together, *Trafficante*, *Gladstone*, and *Havens* stand for the proposition that an FHA claimant may have Article III standing at the pleading stage of the case, based upon allegations (i) of indirect injury to a "relatively compact" area within which the claimant resides which has been the target of a defendant's intentionally discriminatory conduct; and (ii) that the claimant has suffered a "distinct and palpable," non-speculative injury, fairly traceable to the challenged conduct of the defendant.

Trafficante involved allegations of discriminatory "racial steering" practices in violation of the FHA in apartment rental practices. *Trafficante*, 409 U.S. at 207-208. The standing issue arose at the pleading stage. Without

reaching the merits of the case, the trial court held that the plaintiffs did not have standing to sue under the FHA because they were not direct targets of the defendant's discriminatory conduct. *Id.* This Court reversed, holding that direct injury was not necessarily required to sufficiently allege standing. However, the Court recognized that the indirect injury concept has limits, and held that it could only confer standing on residents of the "same housing unit" who are actually injured within the meaning of the FHA. *Id.* at 212.

Gladstone also involved allegations of racial steering, this time in connection with home sales. *Gladstone*, 441 U.S. at 94-95. Again, the standing issue arose at the pleading stage of the case. The Court followed *Trafficante*, holding that allegations of an indirect injury may be sufficient to confer standing under section 812 of the FHA *at the pleading stage*. However, the Court emphasized that Article III standing requirements remain and that a plaintiff's standing to sue is ultimately "determined by the presence or absence of a 'distinct and palpable injury' . . . resulting from [the defendants'] conduct." *Id.* (citations omitted). Further, *Gladstone* expressly noted that certain neighborhoods could never successfully assert a neighborhood injury:

> A "neighborhood" whose racial composition allegedly is being manipulated may be so extensive in area, so heavily or even so sparsely populated, or so lacking in shared social and commercial intercourse that there would be no actual injury to a particular resident.

Id. at 114.

Like *Trafficante, Havens* involved allegations of racial steering in connection with apartment rental practices. As with *Trafficante* and *Gladstone*, the standing issue arose at the pleading stage. The defendant argued that the two individual plaintiffs, who did not live in the subject apartment complexes, had failed to demonstrate how their neighborhoods were affected by the alleged steering practices. The Court agreed:

> It is indeed implausible to argue that [the defendants'] alleged acts of discrimination could have palpable effects throughout the entire Richmond metropolitan area . . . Our cases have upheld standing based on effects of discrimination only within a 'relatively compact neighborhood' . . . We have not suggested that discrimination within a single housing complex might give rise to [a] 'distinct and palpable injury' . . . throughout a metropolitan area.

Havens, 455 U.S. at 377. The Court nevertheless permitted the *Havens* plaintiffs to pursue their indirect injury claim because the case was still at the pleading stage. *Id.* at 377-378

The instant case presented the district court with a disparate impact claim against thirteen unrelated groups of homeowners insurance companies, on behalf of the approximately 93,000 residents of every Missouri zip code having a minority population of greater than fifty percent. Like the plaintiffs in *Trafficante*, *Gladstone* and *Havens*, petitioners have relied upon an indirect injury theory as their basis for Article III standing. That is, however, both the

beginning and the end of any factual similarity between those decisions and this case.

First, *Trafficante*, *Gladstone* and *Havens*, examined the plaintiffs' allegations at the pleading stage, and explicitly emphasized that the adequacy of proof of the plaintiffs' standing was not before the Court. *Gladstone,* 441 U.S. at 115 ("The adequacy of proof of respondents' standing is not before us."); *Trafficante*, 409 U.S. at 209-210 ("Individual injury or injury in fact . . . is alleged here. What the proof may be is one thing[.]"); *Havens*, 455 U.S. at 377-78 ("[I]n the absence of further factual development, we cannot say as a matter of law that no injury could be proved . . . Under the liberal federal pleading standards . . . dismissal on the pleadings is inappropriate."). The district court here acknowledged those decisions in denying the insurance companies' motions to dismiss for lack of standing at the initial pleading stage of this case.

Once this case had proceeded beyond the pleading stage, however, the district court was obligated to consider the record in determining whether the plaintiffs had standing. *Lujan*, 504 U.S. at 561 (holding that standing is "an indispensable part of the plaintiff's case" that "must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation"). The district court's dismissal in this case took place after development of an extensive record during class certification

discovery.[4] The district court considered the evidence before it and appropriately dismissed the case (without prejudice).

Petitioners presented no "particularized allegations of fact" to support their claims of diminished property values caused by the challenged practices of the insurance companies. Some of the named plaintiffs themselves testified during class discovery that their property values, and property values generally in their neighborhoods, had actually *increased* over the relevant time period. The sociologist on whose opinion petitioners relied for their indirect injury theory failed to offer any opinion or testimony articulating a causal link between the petitioners' purported indirect injury and the challenged conduct of the insurance companies. The district court found that the record suggested no correlation between zip code boundaries and "neighborhoods," and that "several distinct neighborhoods are often lumped together in one zip code[.]" At the close of class discovery, there was no factual support for petitioners' indirect injury theory.

Second, petitioners failed to show that their statewide neighborhood was relatively compact. The "target area" -- a

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[4] Just as a district court must dismiss a case for lack of subject matter jurisdiction *at any stage of a proceeding*, it must also do so for lack of standing. Fed. R. Civ. P. 12(h)(3); *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994) ("Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation.") In class action cases, the Article III standing requirements must be met "at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23." *Sosna v. Iowa*, 419 U.S. 393, 402 (1975). Therefore, it was not only appropriate and within its discretion for the district court to consider the question of petitioners' standing at the class certification stage of this case, it was incumbent upon it to do so.

state-wide area comprised of twenty-five zip codes including more than 93,000 individual homeowners living in widely varying housing stock -- is not remotely like the "relatively compact" areas in *Trafficante* and *Gladstone* (a single apartment complex and a 12-by-13 block area, respectively). In *Havens*, where the plaintiffs described their "neighborhood" as the entire area of Richmond, the Court viewed as "implausible" the plaintiffs' claim that a single defendant's alleged intentional "acts of discrimination could have palpable effects throughout the entire Richmond metropolitan area." 455 U.S. at 377. "Our cases have upheld standing based on effects of discrimination only within a 'relatively compact neighborhood.'" *Id.*, *quoting Gladstone*.

After class certification discovery, it became evident that petitioners' defined "neighborhood" was simply too large to qualify as having suffered a "distinct and palpable" injury. Without that, the district court properly determined that petitioners lacked Article III standing, and dismissed the case.

Third, petitioners' indirect injury claim is far less "concrete" and demonstrable than were the indirect injury claims at issue in *Trafficante*, *Gladstone* and *Havens*. Each of these cases involved allegations that a single defendant group had indirectly injured a defined "neighborhood" through acts of intentional discrimination ("racial steering"). By contrast, petitioners here have relied on an allegation that the non-discriminatory conduct of all thirteen unrelated defendant groups indirectly injured every resident of the defined "neighborhoods" because it had a disparate impact on the defined neighborhoods. Consequently, petitioners were faced with the exceedingly difficult task of demonstrating that they had suffered "a distinct and palpable injury" that was

"fairly traceable" to the non-discriminatory conduct of each of the respondent groups. Given the sprawling and amorphous nature of petitioners' defined "neighborhoods," petitioners did not (and could not) make such a showing.

II.

THE LOWER COURT'S DISMISSAL DID NOT IMPERIL THE INTEGRITY OF THE FAIR HOUSING ACT.

An FHA plaintiff must satisfy the fundamental Article III standing requirements at all stages of a lawsuit. *Lujan*, 504 U.S. at 560-61; *Trafficante*, 409 U.S. at 209-210; *Gladstone*, 441 U.S. at 99-100; *Havens*, 455 U.S. at 372-73. The district court dismissed petitioners' FHA claims because petitioners did not sufficiently demonstrate compliance with these constitutional requirements, and expressly granted them the right to refile. The lower courts did not imperil the integrity of the FHA, but rather recognized that under *Trafficante*, *Gladstone*, and *Havens*, suits under the FHA always remain subject to the fundamental standing requirements of Article III.

CONCLUSION

There is no reason for the Court to exercise its supervisory powers in this case. The district court's decision subscribes to the opinions of the Court with which it is alleged to conflict. It is grounded on petitioners' failure to produce evidence supporting their contentions of indirect injury. The dismissal was without prejudice and petitioners have already filed new complaints.

For the foregoing reasons, the Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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